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Mapping Defamation Defences

Eric Descheemaeker*

Tort defences are generally neglected; and given the considerable role they play in defamation, this is probably the cause of action where this neglect matters most. The law of defamation recognises a dozen or so defences: at first sight the list looks like a hotchpotch of unrelated doctrines. This paper is an attempt to reduce them to a few guiding principles. Taking as its starting point the definition of the cause of action as an injury to the claimant's reputation, it argues that those doctrines fall into three classes: (i) defences which exclude unlawfulness, ie justify the injury on the basis that it was inflicted in pursuance of a right or liberty granted to the defendant; (ii) defences which exclude blameworthiness, ie excuse the defendant because he was not at fault for causing the injury; (iii) defences which relieve the defendant of liability despite the injury being both *non iure* and negligent: that last group, not being underpinned by already recognised principles, deserves particular scrutiny. Part of it really is concerned with the rule of repetition, which needs to be qualified by the recognition of a defence of 'warranted republication'; the remainder ought to be abolished, being an anachronistic hangover from the old requirement of malice.

There is probably no tort where defences play a greater role than defamation. Like its Roman forbear, the delict of *iniuria* (ie insult, contempt), the English wrong is defined in an extremely broad and open-ended way, being concerned with the publication of any statement liable to cause 'right-thinking members of society' to think less well of the plaintiff. This is the first stage: the elements of liability which fall on the claimant to

* University of Edinburgh. I am particularly indebted to Andrew Kenyon for his invitation to present a preliminary version of this paper at a conference in Melbourne on 23-24 April 2014, and also to James Goudkamp, Paul Mitchell, Andrew Scott and an anonymous reviewer for their perceptive comments on an earlier draft.

establish, that is to say, the *prima facie* cause of action. In tort textbooks these typically make up one chapter. This chapter will be followed by another one, setting out defences which allow the defendant to reverse the provisional finding of liability by establishing the existence of further sets of facts: the likes of truth, fair comment (honest opinion) or various forms of privileges. Only if no such defence succeeds will the claimant win.¹ While this is in a sense true of all causes of action, the striking feature of defamation is how far the second stage goes towards undoing the first: where defences would normally have the effect of fine-tuning the boundaries of liability established by the *prima facie* cause of action, defamation defences are in the altogether different business of reclaiming much – if not most – of the ‘territory’ that the first part of the enquiry had handed to the pursuing party. At the end of the day, the situations in which the claimant will in fact obtain a remedy bear little resemblance with the impression the reader had been left with at the end of the previous chapter. The boundaries of liability have shifted radically. The distance might be impossible to measure but neither is it possible to deny it; one objective indicator is the sheer size of those sections that pertain to defences in academic treatments of the field.

This calls for attention. It is at least possible that we might find it to be wrong, as a matter of principle, for the law to allocate so much of the work of determining actionability to the second stage of the enquiry, with its corollary, the fact that the task of establishing the relevant facts is put on the shoulders of the defendant. At the very least, even if we do not challenge the principle, we ought to examine very closely what is actually going on at this crucial second stage. Yet, by their very nature, defences in the

¹ I ignore throughout this paper liability-defeating factors that are external to the cause of action (ie the claimant-defendant relationship), such as immunities or limitation bars. These may or may not be regarded as defences properly so called; at any rate they are not defamation defences in any specific sense of the term.

law of defamation have shared in the general disinterest that has plagued defences.² This is true of individual defences – though not all to the same extent – and even more so of defences taken as a whole. This paper is an attempt to begin the remediation, looking at defamation defences in their generality. This will be done in the context of English law (which in turn necessarily imports at least some consideration of the European Convention on European Rights and the related case-law, both from the Strasbourg court and, in the post-Human Rights Act 1998 era, from domestic courts);³ however many of the arguments and conclusions should be, if not immediately transposable, at least directly relevant to other jurisdictions whose law has historically stemmed from English law. The main ambition is to understand better how defamation defences operate: faced with such a long – and seemingly haphazard – list of doctrines described in the literature as ‘defences’, with little or no apparent unity (in contrast with the – strikingly simple – *prima facie* cause of action), can we step back and identify a few guiding principles which underpin their operation? In other words, can we discern underlying rationality beneath the disorder we are faced with, as enquirers, when we approach the second stage of the action in defamation? The alternative would seem to be simple: either we can and we will have achieved something valuable in terms of *simplifying* and *rationalising* this area of the law; or we cannot and severe doubt will have to be cast on whether the current system – inherited from hundreds of years of slow and gradual development, and the basic structure of which has been left virtually untouched by judicial or even legislative reforms – is at all sustainable.

The conclusion, at the end of the exploration, will be that indeed we can. The gist of the paper is that (as often happens), when we open up this area of the law and try to see how the pieces of the jigsaw fit together, we can bring to the fore some ideas – rather

² J. Goudkamp, *Tort Law Defences* (Oxford: Hart, 2013) 7-11.

³ See below, ‘The English law of defamation and the Human Rights Act 1998’.

simple ones – which have provided the implicit structure on which the law has relied all along, if with a dim consciousness (its being in the nature of the common law that arguments about the interpretation of earlier authority will soon take precedence over the examination of first principles). In turn, provided they are not entirely corrupt, these guiding principles will provide the basis from which we can examine, and reform, the rest of the law, trying to work them out in a systematic way so as to achieve that third requirement of justice: *consistency*.

As will be explored, some of the defences deny that the injury caused to the claimant was unlawful, because the law grants permission to the defendant to inflict it in the pursuit of a right or liberty; while others deny that it was culpable (ie blameworthy), thereby working out an increasingly visible standard of negligence within a cause of action that had historically been rooted in the altogether distinct paradigm of malice. When these have been identified, there remains some doctrines which relieve the defendant of liability despite his conduct being both unlawful (in the sense of *non iure*: not carried out in pursuance of such right or liberty)⁴ and blameworthy: these need to be scrutinised with particular care because they *prima facie* lack a justificatory basis. As will be seen, some are concerned with secondary publishers, ie repeaters of slanders,⁵ and really operate to qualify the so-called ‘rule of repetition’ by granting a defence of *warranted republication*; while others turn out to be organisational principles referring the matter in dispute to another province of the law. Yet others appear to have no equivalent justification and the case for their abolition will be considered.

⁴ Text to n 28 below.

⁵ The distinction that is drawn here is between defendants who make incriminations for themselves, even if these did not originate with them (‘primary publishers’) and those who repeat incriminations without taking a stance as to their truth value (‘secondary publishers’, who would become primary if they endorsed the statement). Note that this is not the sense in which the terms are typically used in the literature.

Because a number of preliminary questions must be answered before we can proceed to the examination of the individual defences, the first part of the paper will be concerned with ‘setting the scene’. It is followed by three parts examining the relevant doctrines along the lines explained above. Like all papers concerned with taxonomical issues, the descriptive and normative dimensions are inextricably intertwined here: we can hardly identify a measure of order without wanting to perfect it; at the same time, this being the work of a black-letter lawyer rather than a theorist, the starting point has to be the law as it comes to us in the sources, muddled though they might (appear to) be, rather than an abstract model pre-existing in our mind.

SETTING THE SCENE: SIX PRELIMINARY QUESTIONS

Given its aims, the exercise set out in the introduction requires us to examine at least six preliminary questions. Because we are concerned with defences generally within the tort of defamation, we need to know what is meant by a ‘defence’ in that context: in turn, this will allow us to define what counts as the *prima facie* cause of action. Because we are also concerned with defences individually, we need to identify all the doctrines that qualify as such. Furthermore, the concepts of unlawfulness and fault which are guiding our enquiry will need to be given some attention; and the historical model of defamation being rooted in malice and its rebuttal, which still constrains so much of the modern law, must be sketched out. Finally, the restraining role of the Human Rights Act on the substance of the English law of defamation, including its defences, must be explained at least briefly.

The definition of a defence

In the present context, ‘defence’ is used to describe those ingredients of tortious liability (ie the elements required for the success of the action, whether they be defined positively – by their presence – or negatively – by their absence) which fall on the defendant to prove or disprove, by contrast with the *prima facie* cause of action, which contains the elements that are for the claimant to prove.⁶ Thus truth is a defence because it is for the defendant to plead and establish it, not for the plaintiff to prove the absence of truth (falsity); likewise, if it were for the claimant to show that the defendant’s statement qualified as one of fact, then comment would cease being a defence and ‘non-comment’ would become part of the *prima facie* cause of action. This procedural definition coheres with the normal use of the term in the context of defamation and is purely descriptive, in the sense that it is neutral as to the question whether the division of labour that the law operates between the parties to the dispute is satisfactory or not.

It should be noted that there also exist ‘defences to defences’ (in Latin *replicationes*),⁷ whereby the onus shifts back to the claimant to prove a further set of facts – typically malice on the defendant’s part – in order to dislodge a *prima facie* defence open to his adversary (eg qualified privilege, honest opinion) and thereby reinstate the original finding of liability.

The *prima facie* cause of action in defamation

Contrariwise, the *prima facie* cause of action will comprise those elements pertaining to the requirements of liability which fall on the claimant to prove and which, absent a defence, will lead to judgment in his favour. In the tort of defamation, even though there

⁶ For a fuller analysis of the concept of defence, see E. Descheemaeker, ‘Tort Law Defences: A Defence of Conventionalism’ (2014) 77 MLR (2014) 493, 494-499.

⁷ Singular ‘*replicatio*’.

is no single utterance, either judicial, legislative or doctrinal, which everyone would accept constitutes *the* definition of defamation, it should not be controversial to agree on the following: the wrong of defamation consists in the publication of a statement which has a tendency to lower the plaintiff's reputation in the eyes of right-thinking members of society, subject to defences.

By construction, the bits before 'subject to defences' (in the previously defined sense) constitute the *prima facie* cause of action. While no-one would argue that the content of the proposition is straightforward, it can be taken as a given for our purposes, being the legal principle which all the doctrines studied in this paper serve to narrow down. As already remarked, this *prima facie* cause of action is remarkably broad and also strikingly simple, especially when contrasted with the diversity of the materials hiding behind the phrase 'subject to defences'.

Defamation defences

The general definition of defences, coupled with that of the cause of action in defamation, allows us to identify defences in the specific context of defamation: these will be the elements pertaining to the claimant-defendant relationship which fall on the defendant to prove and which account for the wedge between the (broad) *prima facie* tort – as defined above – and the (much narrower) actual cause of action, ie those situations where the defendant will be held liable.

Just as there is no official definition of the wrong of defamation, so there is no official list of defences. But again there should be nothing controversial in relying on the list provided by what constitutes the most comprehensive resource on defamation in the

English-speaking world, namely *Gatley on Libel and Slander*.⁸ (There might be disagreement as to the classification of those defences, eg whether doctrine *x* is self-standing or a species of the wider doctrine *y*, but this does not detract from the agreement as to the overall scope of defences, ie the materials contained therein.) The list runs as follows:

- truth (sometimes still known as ‘justification’);
- fair comment (now commonly referred to as ‘honest opinion’);
- absolute privilege;
- qualified privilege;
- responsible publication on matter of public interest (known for a long time as the ‘*Reynolds* privilege’);
- offer of amends;⁹
- innocent dissemination;¹⁰
- consent;
- release;
- limitation;
- *res judicata*.¹¹

We can immediately set apart, and exclude from the scope of this paper, the last four since they are general defences in the law of tort (or beyond) and tell us nothing about defamation in particular. It is the other doctrines that the present paper attempts to map and reflect on.

⁸ A. Mullis and R. Parkes (eds), *Gatley on Libel and Slander* (London: Sweet & Maxwell, 12th ed, 2013) [hereinafter *Gatley*].

⁹ Formally, a similar mechanism introduced by Lord Campbell’s Act in 1843 is still part of English law, even though it has long been obsolete (*Gatley*, n 8 above, §19.7). It will be ignored.

¹⁰ Treated by the authors in the chapter on publication, not within Part II devoted to defences.

¹¹ *Gatley*, n 8 above, §10.2.

Wrongfulness, unlawfulness and fault

Before the exercise can start, several more points need to be addressed. The first concerns the relationship between three key concepts that will be used as part of the mapping exercise: ‘wrongfulness’, ‘unlawfulness’ and ‘fault’. Naturally all three are polysemous words describing complex concepts, but all that matters in the present context is to highlight a few distinctions, which are all present to various degrees in English law, even though we do not examine torts consistently through their lens (contrary to what would happen in a system like South Africa).

Put simply, any cause of action in tort is concerned with specific events happening in the real world: if these events had not occurred, no-one could even contemplate bringing an action. These events can be described in terms of specific harms or losses, or in terms of the violation of rights or protected interests: the important point is that they are not constructed by the law; rather the business of the law is to analyse and filter them through its own categories to decide whether liability will ensue or not. Thus, without an injury to reputation (even, for historical reasons, a deemed one), there could be no recourse to the tort of defamation;¹² without loss of the sort which it takes cognisance of (physical injury, damage to property, psychiatric harm, pure economic loss and so on), there could be no coming into play of the tort of negligence, etc. This first element we can call the ‘relevant events’.

¹² Of course ‘reputation’ and ‘injury’ are themselves legal constructs, in one sense at least, but they do not create the reality they seek to explicate. This might be easily lost sight of because defamation is an intangible reality; yet the law does not create it any more than it creates a wound when it describes it as an ‘infringement’ of ‘bodily integrity’.

It is a trite proposition that not all these events will be actionable, in the sense that they will lead to a finding of liability against the defendant. Thus, the defendant will not be liable in negligence for causing relevant loss to the claimant if he was under no duty to take care not to do so, or if he did not breach that duty. The totality of the distance that exists between the relevant events and those which are ultimately actionable we can call ‘wrongfulness’: by construction, only a wrongful injury will be actionable.

Among the elements which pertain to wrongfulness, a simple distinction can be drawn between those which concern the defendant’s state of mind (or lack thereof) and those which are external to him. The former we can call ‘fault’ or ‘blameworthiness’;¹³ the latter is what I call ‘unlawfulness’.¹⁴ Fault should not be difficult to understand; unlawfulness might be more confusing because English law does not make use of it as a self-standing concept of general application across the law of torts. This is not because it is not there, but because it is typically reduced to other concepts. At the risk of oversimplifying, it could be said that in all causes of action bar one, the requirement of unlawfulness collapses into the non-existence of a defence: in other words the relevant injury is *assumed* to be unlawful (in the Roman terminology, *non iure*) and the way this presumption is reversed is through the defendant proving that he caused it in a situation such that the law provides him with a defence. The exception is negligence, which is too open-ended to fit that model and where the bulk of the unlawfulness enquiry is subsumed under the question whether a duty of care does or does not exist: where no

¹³ ‘Fault’ is an easier term but it is dangerous because of its slippery character; in particular it is often taken to mean one particular degree of fault, namely, negligence or *culpa*.

¹⁴ Confusingly, legal systems or scholars that resort to this dichotomy extensively (eg in South Africa) will often speak of wrongfulness to denote what I call unlawfulness. In the broader sense in which wrongfulness is used here, by construction *all* defences exclude wrongfulness: for an injury cannot be wrongful if it is not actionable, and it cannot be actionable if the defendant is possessed with a defence.

duty existed in the first place not to be careless (or not carelessly to injure the claimant), the injury will not be unlawful, no matter how much at fault or to blame the defendant might in fact have been.

Against this background, it will be argued that some defences in the law of defamation deny that the relevant loss (the injury to reputation) was unlawful, while others deny it was blameworthy and yet others do neither.

Malice and its rebuttal

The penultimate point to consider before we can examine individual defences is the role of that elephant in the room of defamation: malice. Malice – whatever exactly the term is taken to mean – has largely disappeared from the modern English tort: the student coming to it for the first time today might not even encounter the term until he reaches the stage of defences, indeed of *replicationes* ('defences to defences'). While this paper is not the place to explore either the meaning or significance of malice in the law of defamation, it must nonetheless be kept in mind, by way of background to what follows, that in the formative centuries of the law malice played an absolutely pivotal role: a defamatory imputation such as would be redressed by the law was *necessarily* malicious; however such malice – which appears to have meant something like spite, ill-will or malevolence – was presumed from the publication of the defamatory words. Thus one of the primary tasks for the law became to determine under what circumstances the presumption could be rebutted. The defences of qualified privilege and fair comment, in particular, developed from such attempts to identify clusters of situations where the presumption of malice could be dislodged, meaning that it would fall back on the claimant positively to prove it (hence the residual role it still plays in both defences today). Outside these situations, the presumption of malice came to be regarded as

irrebuttable, which is functionally equivalent to saying that the tort is one of strict liability (ie one where no allegation needs to be made or proved concerning the defendant's state of mind). The story has been told before;¹⁵ what matters in the present context is simply to keep this historical fact in mind throughout the enquiry and, in particular, to remember that a feature of the law which was historically explained by the requirement of malice cannot rely on it for its continued existence today if, as clearly seems to be the case, malice no longer underpins the law of defamation. It will either have to find another justification or go.

The English law of defamation and the Human Rights Act 1998

To conclude this scene-setting part, it is necessary to introduce at least briefly the new context in which the English law of defamation has been operating since the enactment of the Human Rights Act 1998 (HRA): a context which has constrained the freedom of the common law and greatly complexified the way it operates and develops. Since the coming into force of the Act, 'bringing home' – as it is commonly put – the rights originally encapsulated in the Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950, British public authorities (which include courts handing down judgments on English defamation law) have been required to give effect to Convention rights:¹⁶ in particular¹⁷ the 'right to freedom of expression' under Art 10¹⁸

¹⁵ P. Mitchell, *The Making of the Modern law of Defamation* (Oxford: Hart, 2005) in particular ch 5; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: OUP, 1999) 185.

¹⁶ The term 'Convention rights', used by the HRA, is preferred to 'human rights' because non-humans can in principle be endowed with them, and to 'fundamental rights' because there is no particular reason to believe that the rights listed in the Convention are necessarily more important or foundational than other

and the ‘right to respect for private and family life’ under Art 8 – which itself has been interpreted as encompassing, at least in some circumstances, the right to reputation which the tort of defamation protects in domestic law.¹⁹

The main reason why these developments have greatly complexified the law is because of the considerable amount of uncertainty that surrounds the meaning of ‘giving effect’ in this context. To simplify, we have in defamation actions two relevant Convention rights which (i) are defined in a non-absolute way, each making cross-references, at least implicitly, to the other; and (ii) are bound, at least *prima facie*, to conflict with one another.²⁰ The received expression to describe what courts are meant to do when faced with such an apparent impossibility fully to give effect to either right is to

rights recognized by the common law, even though they are undoubtedly given a particular authority by virtue of their being enshrined in the European Convention and then the HRA.

¹⁷ Note however that, despite the impression often conveyed in the literature, other Convention rights can be relevant to defamation claims, eg the ‘right to a fair trial’ under Art 6 (for an example see below, text to n 100). But Art 8 and Art 10 contain the two rights which would seem *invariably* to be engaged, hence the focus on them.

¹⁸ It is not clear whether having a ‘right’ to a ‘freedom’ is a meaningful legal proposition, but this is a discussion outwith the scope of this article.

¹⁹ The – wavering – case law is aptly summarized in A. Mullis and A. Scott, ‘Reframing Libel: Taking (All) Rights Seriously and Where it Leads’ in D. Capper (ed), *Modern Defamation Law: Balancing Reputation and Free Expression* (Belfast: Queen’s University, 2012) 1, 5-6. Whether the Strasbourg Court was warranted in discovering a right to reputation behind the Art 8 right also lies beyond the scope of this article, but there are reasons to be sceptical.

²⁰ Yet a further complication is that it is not until 2004 that the Strasbourg Court began to recognize reputation as a Convention right at least *prima facie* on a par with freedom of expression, to the effect that there now is a counterweighing consideration to be put on the scales where previously there was none.

‘balance’ them, although what ‘balancing’ actually means, besides ‘splitting the difference’ on an ad hoc, case-to-case basis, is less than perfectly clear.²¹

To add to the complication, the balancing exercise can be carried out both by the European Court of Human Rights (ECtHR) in Strasbourg and by domestic – including British – courts: in another example of reciprocal cross-references, British courts are bound to ‘take into account’ the way the Strasbourg Court has interpreted the Convention rights;²² while at the same time the ECtHR recognises that domestic courts are endowed with a ‘margin of appreciation’ (*marge d’appréciation*), in that their interpretation of the content of Convention rights need not be identical with its own. But variation is only allowed within certain limits: comes a point where judgments of domestic courts will be held to have failed to give effect to one or more Convention rights and therefore, in an English context, to have breached the courts’ duty under s 6(1) of the HRA.

For the purpose of this article, which is not the forum to pursue any of these complex issues, it should suffice to accept that the existence of Convention rights being engaged in the context of defamation actions in English courts provides a framework which constrains the courts’ decision-making: while the European Convention, as mediated by the HRA, does not normally dictate to them any one particular solution, it sets *boundaries* within which English law is permitted to operate if it is to remain Convention-compliant. While these boundaries may not be easy to identify (and where exactly they are placed might be a matter of contention between domestic courts and Strasbourg), it is nonetheless beyond dispute that they do exist. To phrase the very same

²¹ On the notion of balancing rights or interests, see in particular F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: CUP, 1982) 131ff.

²² This need not entail (at least from the perspective of English law) following it in all circumstances: see eg *R v Horncastle* [2010] 2 AC 373, [11].

point more simply, English law is now required, by virtue of the HRA, to be neither too ‘defendant-friendly’ (by granting excessive protection to freedom of expression, ie to Art 10 of the Convention) nor too ‘claimant-friendly’ (by being overly protective of reputation (Art 8)).

One difficulty is that this so-called ‘balancing exercise’ really is an attempt to determine the boundaries of liability in defamation, ie the point at which reputation-injuring statements will become actionable despite the general protection granted to freedom of expression; and this is exactly what the common law had been trying to do, in a different way, for centuries. Even though this point is rarely remarked upon, probably because two distinct sets of authorities and two diverging terminologies are pressed into service, in the post-HRA age the law of defamation is effectively (albeit often unconsciously) asking the same question of actionability twice over. To compound the problem yet further, there is no unanimously agreed position as to how the two answers relate to one another, beyond the shared sense that they ought to be the same and, if they turn out not to be, the answer in terms of balancing Convention rights should somehow take precedence.²³ This makes the task of the careful scholar very more difficult than it once was.

As far as our subject-matter is concerned, what this means is that the English law of defamation now operates within the limited freedom that the European Convention has placed on it through the medium of the Human Rights Act: in the context of defences (as elsewhere), an English court must be satisfied that the shape of the doctrine strikes an appropriate ‘balance’ between the rights enshrined in Art 8 and Art 10 of the

²³ A most useful survey of models to conceptualise the relationship between the two sets of rules is provided in A.L. Young, ‘Mapping Horizontal Effect’ in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP, 2011) 16.

Convention;²⁴ and any proposed reform of the law must also be assessed against that requirement. This ‘upper tier’ while, again, not determining the law on the ‘lower tier’, does place constraints on it. While this article focuses on the lower tier, ie the ‘ordinary’ common law, it will refer to the higher one – ie Convention rights, as they are interpreted both in Britain and in Strasbourg – whenever these become relevant to the argument.²⁵

DEFENCES WHICH EXCLUDE UNLAWFULNESS

We are now ready to start the mapping exercise. Looking at the list of specific defences recognised by the law of defamation, it would appear that two of them are about denying that the injury was unlawful: truth (also known historically as justification or *veritas*)²⁶ and fair comment (honest opinion).²⁷ In both cases, the infliction of the injury to the claimant’s reputation is regarded as lawful, in the specific sense that it was done *iure* (ie, as explained above, in pursuance of a right or liberty²⁸ granted by the law to the defendant because it is deemed to serve a greater good on his side than the protection of

²⁴ See in particular A. Mullis and A. Scott, ‘The Swing of the Pendulum: Reputation, Expression and the Re-centring of English Libel Law’ in Capper, n 19 above, 23, 45ff.

²⁵ On the impact of the Human Rights Act on the English law of defamation generally, a good starting point is K. Oliphant, ‘Defamation’, in Hoffman, n 23 above, 195.

²⁶ The latter is still the name used in Scotland.

²⁷ The two terms will be used interchangeably and are not meant to refer to the defence at one particular stage of its historical development to the exclusion of another. In an English context, the change of name was operated by the Defamation Act 2013, s 3 (following the lead of the New Zealand Defamation Act 1992, s 10).

²⁸ Liberty, understood as the ability to do or refrain from doing an act without committing a wrong, is a species of right. For a very brief overview of the Hohfeldian typology, see R. Stevens, *Torts and Rights* (Oxford: OUP, 2007) 4-5.

any individual's reputation). This would seem to be rather straightforward for truth; fair comment on the other hand is more difficult.

Truth

The Defence

The doctrine of *veritas* tells us that, if the substance of the incrimination made about the plaintiff was true, no action will lie: as far as the law of defamation is concerned,²⁹ and subject to one exception,³⁰ it can never be wrongful in English law to speak the truth of another,³¹ no matter how gratuitous or malicious the utterance might be. Here, English law forked off in the early 16th century from the civilian tradition, where truth was irrelevant in itself but could, when coupled with an element of public benefit, be one of the – many – ways in which the presumption of malice (called *animus iniuriandi*³² in the context of the civilian wrong of *iniuria*) could be rebutted. To the present day, the leading justification of why speaking the truth of others is not actionable apart from any consideration of malice remains Littledale J's words in *M'Pherson*: 'the law will not permit

²⁹ Naturally a true defamatory statement might be actionable as something else than defamation but in that case, by construction, it will not be *because* it is defamatory.

³⁰ The Rehabilitation of Offenders Act 1974, s 8, removes the defence of truth from an action in defamation when a spent conviction of the claimant's was published with malice.

³¹ The phrase is infelicitous in the sense that what matters is not whether the words are true but whether the incrimination they carry is – remembering that the law ordinarily discounts the expression of any distance between the defendant and the content of his statement. This makes sense of ancillary doctrines such as 'contextual truth' in Australia, which simply tells us that, if the defendant has not caused any further injury to the claimant's deserved reputation, he should not be liable even though the sting of the incrimination complained of was false (cf, in English law, s 2(3) of the Defamation Act 2013).

³² Literally the 'mind to insult'.

a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess'.³³

What this means is that English law considers that the ability to speak the truth is *always* more valuable than the protection of anyone's reputation:³⁴ it might be reluctant to phrase things in such an abrupt way, but if it invariably makes *veritas* a defence for the reasons sketched out above, it must mean that it does. Of course, on a philosophical or moral level, we may want to disagree: there is certainly nothing self-evident with the proposition that truth trumps by nature any other concern – indeed, both in the common law and the civilian tradition, the law of defamation has often refused to regard truth simpliciter as a sufficient justification for causing an injury –³⁵ but what seems beyond doubt is that the existence and shape of the defence shows English law to be committed to that position.³⁶

An Alternative Analysis

An alternative way to analyse the law would be, taking the above reasoning one step further, to argue that the defence of truth really denies the existence of an injury

³³ *M'Pherson v Daniels* (1829) 10 B & C 263, 272; 109 ER 448, 451.

³⁴ I have argued elsewhere that the exception contained in the Rehabilitation of Offenders Act (n 30 above) is best understood as an indirect attempt to protect the claimant's *privacy*: in that sense it is only an apparent exception to this rule (E. Descheemaeker, '“*Veritas non est defamatio*”? Truth as a Defence in the Law of Defamation' (2011) 31 *Legal Studies* 1, 17).

³⁵ E. Descheemaeker, '“A man of bad character has so not so much to lose”: Truth as a Defence in the South African Law of Defamation' (2011) 128 *South African Law Journal* 452, 453ff, 464ff.

³⁶ It is however possible that Convention rights considerations might someday force English law to rethink its position, for it has been suggested that the blanket non-actionability of true statements could amount to a violation of Art 8 in the context of defamation (see eg D. Howarth, 'Libel: Its Purpose and Reform' (2011) 74 MLR 845, 867-8). However, nothing has materialized so far.

altogether. On that reading, the interest protected by the law of defamation is not reputation in the wider sense of the term, ie the reckoning we have in the eyes of others, but *deserved* reputation, ie reputation grounded in the reality of our character. On that reading, publicising a prima facie defamatory, but veridical, statement is not injurious in the first place and so no question arises as to whether the (non-existing) injury is unlawful or not. While I have myself leaned in that direction in the past,³⁷ it now seems more satisfactory to me to consider that there is in fact an injury albeit one which is inflicted in pursuance of a right. The main three reasons are that (i) it coheres with the above, widely-accepted definition of the wrong, which speaks of injury to reputation and not injury to deserved reputation; (ii) it is consonant with our extra-legal understanding of reputation or *fama*, which according to common usage need not be well-grounded to exist as such; (iii) unless it is reinterpreted along the lines suggested above, the existence of even one exception to the rule – the Rehabilitation of Offenders Act – makes it impossible to say that English law *never* protects underserved reputation in the law of defamation, which must mean that violating it is at least prima facie an injury. This injury, however, is regarded as committed *iure* because the law considers that the ability to propagate the truth is invariably and unqualifiedly a greater good than the protection of reputation: as far as the law of defamation is concerned, there is an absolute liberty to speak the truth.

Fair comment

The Defence

The second doctrine which negates the element of unlawfulness by asserting that the injury to the claimant's reputation was inflicted *iure* – in pursuance of a right or liberty –

³⁷ Descheemaeker, '*Veritas*', n 34 above, 14ff.

is the defence formerly known as ‘fair comment’ and now referred to, at least in England, as ‘honest opinion’. This is a complex defence, which it is much more difficult to make sense of than a cursory glance might suggest. In part, but only in part, this is because its precise shape has proved elusive and in constant evolution: the less clearly the requirements of any doctrine can be pinned down, the more difficult it will be to interpret it. After *Joseph v Spiller*³⁸ and the Defamation Act 2013, the gist of the defence now is that a defamatory statement which can be recognised as comment/opinion rather than fact will not be actionable unless shown to be malicious. The old requirement of its being on a matter of public interest has been done away with; absence of malice remains, even though it is acknowledged that its meaning has been gradually weakened: it now seems to mean something like good faith, ie the defendant having genuinely believed what he said, no matter how prejudiced, extreme or indeed unfair it might have been.³⁹

A proper examination of honest opinion would require a paper of its own, and no more than a sketch of my own views can be provided here. The first point to emphasise is that the recent change of name, from ‘comment’ to ‘opinion’, was profoundly misguided. The distinction between fact and opinion, dovetailing roughly with that between falsifiable and unfalsifiable statements,⁴⁰ might feature prominently in the case-law of the European Court of Human Rights;⁴¹ but it is entirely at odds with the historical materials of English law. As Paul Mitchell has shown,⁴² though the fact/opinion dichotomy now has an old pedigree, it was from the beginning an academic

³⁸ *Joseph v Spiller* [2011] 1 AC 852.

³⁹ *Gatley*, n 8 above, §12.36.

⁴⁰ Or, moving the cursor slightly to take into account propositions which are technically provable but in practice virtually incapable of such proof – such as the ascription of a mental state – between those statements which we are content to disagree about and those which we are not. *Gatley*, n 8 above, §12.8.

⁴¹ *Joseph* n 38 above, [74]ff.

⁴² Mitchell, n 15 above, 190.

superimposition on the judicial materials, which drew the line in a way that might look only slightly different in its outcome yet relies on different premises. Indeed, even though opinion would be the main type of comment, comment as a defence was never about opinion or unfalsifiability: it was, as the very name says, about *commenting* – that is, to say, ‘devising by careful thought’.⁴³ In the words of possibly the leading judgment in the English-speaking world, it is ‘something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc’.⁴⁴ Comment can include assertions of falsifiable facts every bit as much as the defendant’s interpretation of a pre-existing state of affairs. What comment must be contrasted with is *primary facts*, which are represented as being true by virtue of being asserted, independently of the person who states them. Comment, on the other hand, is what can be seen to originate in the defendant’s mind: his own take on the matter rather than a ‘conclusionary’ assertion about the claimant.⁴⁵

This idea of conclusiveness gives us the key both to what comment is and why it is not normally actionable in defamation. But before this is examined, it must be specified that, despite the unfortunate recent change of name, this is really still what English law is about. This can be tested by the fact that it was and remains true that, in English law, the same statement can count as fact *or* comment depending on the context.⁴⁶ Thus, asserting that ‘A is a thief’ without more ado is an (obviously falsifiable) statement of fact, which must go to truth. But if the basis for holding to this proposition is disclosed – eg (i) ‘my laptop disappeared’; (ii) ‘only A was around when it happened’; (iii) ‘he blushed when I next saw him’ – then the conclusion that (iv) ‘A is a thief’ will

⁴³ OED, q.v. ‘comment’.

⁴⁴ *Clarke v Norton* [1910] VLR 494, 499.

⁴⁵ A word used in *Mitchell v Sprott* [2002] 1 NZLR 766, [19].

⁴⁶ *Gatley*, n 8 above, §12.8.

now count as comment which will go to the ill-named defence of honest opinion, even though it remains as falsifiable as before.

Authoritativeness

Comment, therefore, is not about provability; it is at its heart about authoritativeness. Whereas an assertion of (primary) facts is meant to be ‘conclusionary’, ie is intended to be believed by the recipient by the sole virtue of its having been uttered by the defendant, a comment is essentially an invitation extended to the recipient to agree: ‘that’s my take on it’ rather than ‘take my word for it’. Faced with the above facts, the recipient might agree that the only plausible interpretation of the facts is that A is indeed the laptop’s thief; equally he might consider that this is too rash a conclusion. He is invited to draw his own conclusion.⁴⁷

In turn, the emphasis on non-authoritativeness helps us understand why comment is not normally actionable (but will be if it is malicious in the sense of not genuine). By removing honestly-made statements that are recognisable as comment from the scope of defamation, what the law intends to protect is our *freedom to reason*: (primary) facts might be the same for everyone, but what we make of them is entirely up for grabs. Of course, our take might be deeply injurious to others but if it is, then so be it: our ability to ‘employ the faculty of reason in forming conclusions’⁴⁸ and in sharing them is too precious, too deeply intertwined with our understanding of what it means to be human, to suffer any limitation in law. The parallel with truth is obvious: if the incrimination made against the claimant is true, it will never be actionable (in defamation) no matter how injurious; similarly, if it is the outcome of an honest reasoning, it is

⁴⁷ In a South African context, see also A. Fagan, ‘The Gist of Defamation in South African Law’ in E. Descheemaeker and H. Scott (eds), *Iniuria and the Common Law* (Oxford: Hart, 2013) 169, 188ff.

⁴⁸ OED, q.v. ‘reason’.

entirely shielded. However, honesty being to comment what truth is to primary facts, the protection falls when it was not made in good faith: there is no ground for protecting anyone's ability to reason if the reasoning is carried out in bad faith. (In fact, one might go a step further and say that a comment is *by definition* honest in the sense of genuinely held: what we really mean when we say that a comment was malicious is that it was only a comment in appearance; in reality it was never the defendant's take on anything, just words strung together with a view to injuring the claimant.)

If the above is correct, English law recognises two goods on the defendant's part which are always greater than the protection of the claimant's reputation, and account for the fact that any injury they might cause to his *fama* will be regarded as having been done *iure*: the ability to speak the truth and also to use his reason – no matter how hurtful the former or misguided the latter might be. There is no 'balancing exercise' between competing values here.

Alternative Analyses

Before we examine the difficult, but extremely interesting, issues raised by the doctrine of 'bare comment', it is helpful to mention that there exist at least two plausible alternative analyses of the defence of fair comment/honest opinion than the one which has just been presented.

The first alternative is to argue that the defence really denies that there was any injury caused in the first place. This interpretation proceeds from the same analysis as above, of comment being concerned with non-authoritative statements, but takes it one step further. The argument will now be that the 'right-thinking member of society' does not normally, and at any rate should not ever – subject to a possible caveat – change his mind concerning the defendant on the basis of something that is not meant to be authoritative, ie taken at face value. He will understand that the comment is only the

defendant's take on the issue. Compared to the previous one, this explanation has two weaknesses. First, it does not account for the *replication* of malice, which would have to be regarded as a hysteretic remnant of the past: by definition, a malicious non-injury cannot be any more injurious than a non-malicious non-injury. Second, the explanation relies heavily on a normative dimension which is observably implausible. We do all change our mind on others, for better or for worse, when hearing or reading something that is evidently comment. On the other hand, it ties well with the use that is already made by the law of the abstract construct of the right-thinking member of society: the present reasoning is no different from the one through which the law is content to assert that an allegation of homosexuality is not defamatory – no-one *ought* to think the less of the claimant when imparted with the information – when we all know that, as a matter of fact, it is – ie at least some people *will* do just that.

Should the law want to go down this line of analysis, we could think about carving out an exception modelled on the doctrine of assumption of responsibility, whereby in some circumstances the defendant will be regarded as having assumed responsibility for the injurious consequences of his defamatory comment. An obvious example would be someone with all the appearances of authority (eg a medical doctor on a matter of medical controversy) publishing the comment to the world at large (eg a newspaper column).

The second alternative analysis differs slightly from the first. It accepts that the claimant might have suffered an injury to his reputation and, rather than accounting for its non-actionability on the basis of its being inflicted *inure*, it explains it through the lens of causation. Specifically, the argument would be to say that if, as argued above, comment constitutes an invitation extended to third parties to agree with the defendant rather than a 'conclusionary' statement, then whether they do in fact agree is down to them. As the person who made the statement, I ought not to be held responsible for

their agreement (again, unless perhaps there was an assumption of responsibility) – whereas I would be if the statement had been authoritative. The issue is not one of foreseeability, for such reliance might be foreseeable enough; but then foreseeability is often no more than an attempt to de-politicise value judgements. Rather, the point is that such reliance is illegitimate in the eyes of the law because I have not invited it and everyone is, at least *prima facie*, responsible for their own reasoning. It constitutes therefore a *novus actus interveniens*:⁴⁹ others might think less well of the claimant following what I said but I am not regarded as the cause-in-law of this change of estimation. *Post hoc sed non propter hoc*.⁵⁰

Bare Comment

Despite being of rather limited practical significance, the doctrine known as ‘bare comment’ is worth looking at in some detail here because it provides us with important insights concerning the *modus operandi* of comment as a whole. What the doctrine holds is that defamatory comment not visibly grounded in any pre-existing facts (in Lord Phillips’ words, ‘which inferred discreditable conduct of some kind without giving any particulars of the conduct’) –⁵¹ for instance, ‘A is a disgrace to human nature’ – cannot go

⁴⁹ A parallel would be with my crossing the street when the traffic light man is red: I make an assessment of the viability of the attempt which is simply my own. If the person behind me decides to follow me without checking for himself, and is run over by a car, he cannot shift the responsibility onto me (unless perhaps he can establish very strong counter-factors, like his being my son). It might be entirely foreseeable that less agile people will follow me in my daring attempt; but in order to protect my freedom of action the law must consider that such following is illegitimate.

⁵⁰ ‘After this, but not because of this’.

⁵¹ *Joseph* n 41 above, [88].

to the defence of fair comment/honest opinion; rather it must be justified.⁵² While it is not entirely clear what justification means in that context, it is likely to entail the proof of facts sufficient for the defence of honest opinion to succeed had they been disclosed.

On the face of it, this seems to run against the basic distinction between fact and comment, and the division of labour between the defences of truth and fair comment. For the doctrine to become intelligible, we need to realise that the English defence of comment as it has developed *incorporates a defence of truth*. One foundational feature of the defence is that it requires sufficient disclosure of the underlying (primary) facts on which the comment is based: these must either be stated with sufficient precision or they must be otherwise known or knowable by the third party, for instance because they are matters of public knowledge.⁵³ What does not appear to have ever been remarked is that this is a strange requirement, especially if – as is often asserted today – comment is about unfalsifiable opinion: if the basis of the defence is that the statement is beyond the realm of truth and untruth, why should it matter what (falsifiable) facts this neither-true-nor-false opinion is based on (or indeed whether it is grounded in any reality)? If anything, this would seem to undermine the basis of the doctrine, which is that it is not concerned with facts and their verification.

The explanation that was offered above concerning the nature of comment makes, however, complete sense of it: for it is the disclosure of these underlying facts which identifies the subsequent step as a comment originating in the defendant's mind (hence not to be regarded as authoritative). Failing this, as was mentioned, the very same statement might well qualify as fact having to go to truth. But, if primary facts are indeed

⁵² *Brent Walker Group v Times Out* [1991] 2 QB 33, 44H. Of course another defence might be available (eg qualified privilege); we are simply concerned here with the respective territory of truth and fair comment *vis-à-vis* one another.

⁵³ *Joseph* n 41 above, [3], [30], [65]; *Gatley*, n 8 above, §12.24.

disclosed – with authority – then logic suggests that they ought to be justified. It would be patently absurd if, in the above example, the identification of (iv) as comment meant that (i)-(iii) became unchallengeable whereas, had they stood on their own, they would have had to be proved true: their nature does not change when a further step is taken on their basis. What happens is that, when (iv) is added, we are analytically faced with two different defences: truth as far as (i), (ii) and (iii) are concerned, and fair comment for the comment made on their basis, ie (iv). For obvious reasons of simplicity English law has practically merged the two: whereas (i)-(iii) on their own must go to truth, once (iv) is added fair comment takes over, but still requires the underlying facts – (i), (ii) and (iii) – to be justified according to their own rationale, ie through truth. It is only in respect of the comment part, (iv), that it operates on the basis of its stated logic.

For that reason, a difficulty is bound to arise if the first tier of the defence is in fact bypassed, ie no underlying facts are provided. How should the law deal with such ‘bare comment’? There are two possibilities. One is to identify some primary facts underneath the comment. If the comment is an inference of fact (‘he is a thief’ in the above example) it can be turned into an authoritative assertion of fact and removed from fair comment altogether. If it is an opinion, the law will require the substantiation of facts which would have been sufficient as a basis for fair comment had they been stated. As was seen, this is the line English law has chosen to take.⁵⁴ It is perfectly intelligible and coherent, the idea being that by asserting such a thing as ‘he is a disgrace to human nature’, I have implied that I know *certain things* about the person concerned which have led me to my conclusion: these facts, whatever they might be, are self-evidently defamatory and thus must be accounted for.

⁵⁴ See n 52 above; *Gatley*, n 8 above, §12.9.

It is logical but it is not the only logical way to think about it. An alternative would be to say that bare comment is entirely unactionable.⁵⁵ On that reading, if no incrimination was made – ie made explicitly – no *prima facie* wrong has been committed. The best parallel is with insults: if I use an expletive concerning the defendant, at least of the sort which is understood to be more than a meaningless expression of dislike and to reflect on his character, abilities and the like – eg ‘son of a bitch’ – then I have evidently implied he has done *something* of such a nature that it would be defamatory if I asserted it. On the current logic of bare comment I should be required to disclose and justify those facts. Yet it is well established that such non-incriminating insults (often called ‘mere abuse’) are unactionable: ‘son of a bitch’ is not even *prima facie* defamatory.⁵⁶ Thus abuse is treated following the alternative logic sketched out above. But then it is not clear why bare comment should be treated differently; indeed in many situations it is not clear at all how bare comment is different from insult.⁵⁷

A choice ought to be made and applied consistently. Because there is something arguably very odd, to say the least, in the first above logic – which forces the defendant to commit a *prima facie* wrong (by requiring him to make explicit a sufficient factual basis) before he can attempt to escape liability (by proving its truth) – it would seem that the better solution, in terms of both logic and justice, would be to cut off the fact component from the defence of comment and to hold that, *if* such factual incriminations are made, they must be treated according to the normal avenues; whereas the comment

⁵⁵ Unless, following ordinary principles, it can be shown that the view was not genuinely held by the defendant (which, in the absence of disclosure of any basis, would seem to be a practical impossibility).

⁵⁶ *Gatley*, n 8 above, §3.37.

⁵⁷ The only clearly different cluster of cases concerns assertions of facts which are presented as inferences yet do not disclose their basis (eg ‘on the basis of what I know he is a thief’): this is not insult and it cannot be reinterpreted as an assertion of primary facts either.

part will be unactionable by virtue of being non-authoritative (unless proven not to have been believed by the defendant). As a result, honest bare comment would become – like insults – unactionable.

DEFENCES WHICH EXCLUDE BLAMEWORTHINESS

Defamation consists in an injury to reputation. Sometimes, the injury will not be actionable because it was inflicted *iure*, in pursuance of a right or liberty regarded by the law as of greater value than the protection of any reputation. The previous section identified two such goods: the ability to speak the truth and to use one's reason, corresponding to the defences of *veritas*/justification/truth and fair comment/honest opinion respectively.

The present section considers two defences which deny that the infliction of the injury was blameworthy (ie culpable): responsible publication on a matter of public interest and innocent dissemination. The former avers that the defendant reasonably believed that the defamatory statement was true, hence not unlawful; the latter that he had no reason to believe that the statement he disseminated was defamatory in the first place: dissimilar though they might appear to be (and indeed are), the two defences share a common underlying logic. After they have been examined, some further remarks – both descriptive and normative – will be made on the significance of this negligence standard in the law of defamation, an area that was historically shaped by the entirely distinct paradigm of malice.⁵⁸

Responsible publication

⁵⁸ See above, 'Malice and its rebuttal'.

To start with, let us consider what was known until recently as the ‘*Reynolds* privilege’ or defence of ‘responsible publication on a matter of public interest’ (sometimes also ‘responsible journalism’, even though it was never restricted to the media). As we turn our attention to it, it might be easier to consider first the position of the law before the enactment of the Defamation Act 2013 and then any changes that the Act might have brought. It will be argued that the Act does not in fact change the substance of the defence but, because this is far from being self-evident, the question is best considered separately.

Responsible Publication Before the Defamation Act 2013

The developments concerning this defence, starting with the seminal case of *Reynolds*,⁵⁹ being well known, there is no need to consider them in any detail in the present context. Subject to some possible fine-tuning, what the defence did – in an attempt better to protect freedom of expression compared to the earlier law –⁶⁰ was to allow the defendant to escape liability by proving that the statement he published to the world at large,⁶¹ although defamatory, concerned a matter of public interest; and also that care had been taken in the gathering and publication of the facts, in particular in terms of verification. The gist of the defence was best captured, not by any English case, but by the Supreme

⁵⁹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

⁶⁰ Eg *Reynolds* n 59 above, 200 (Lord Nicholls: ‘My starting point is freedom of expression’). Whether this was a warranted assertion has however been doubted: see eg Tugendhat J in *Flood v Times Newspapers* [2009] EWHC 2375 (QB) at [136]ff.

⁶¹ For that reason, it would not have been eligible for qualified privilege in all but the most unusual circumstances.

Court of Canada when it recognised its own version of the *Reynolds* privilege in *Grant v Torstar*: in the words of McLachlin CJ,

I ... would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances'.⁶²

In other words, within its scope of application (matter of public interest), the *Reynolds* defence is one of reasonable belief in the truth of the incrimination (or 'reasonable truthfulness'). This is straightforward enough.

Responsible Publication After the Defamation Act 2013

More difficult is the sequence of events which led to the enactment of a new statutory version of the defence in the latest British Act, which now provides that:

- 4 Publication on matter of public interest
- (1) It is a defence to an action for defamation for the defendant to show that –
 - (a) the statement complained was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

Whereas the 'breadth' of the defence – ie its scope of application – has remained the same, its 'depth' – the condition on which it applies – is now phrased in a way which no

⁶² *Grant v Torstar Corp* 2009 SCC 61, [98].

longer makes any reference to reasonableness: the word has even disappeared from the name of the defence, now to be known as ‘publication on matter of public interest’. This is puzzling for many reasons, not the least being that, whatever the under-determined (and never defined) concept of ‘public interest’ might mean, it had always referred in this context to the *subject-matter* of the statement, not the circumstances surrounding its publication. In its current form, the phrase ‘publishing the statement was in the public interest’ seems to be no more than a broad token of approval – a ‘good thing’ as opposed to a ‘bad thing’ – used to avoid having to refer to the standard of responsible publication (ie reasonable truthfulness) as it had been developed by courts over the 15 years running up to the Act, while retaining some sort of fault-shaped hurdle in addition to the requirement of the statement objectively being on a matter of public interest.

I have explained in more detail in another forum what I think caused this shift and why it is more apparent than real.⁶³ In brief, the cause was the interference caused by the judgment of the Supreme Court in the case of *Flood*,⁶⁴ which was handed down in the middle of the parliamentary procedure. *Flood* concerned a case of what is now known as ‘reportage’, that is to say, a situation where the defendant republished a defamatory statement made by another without adopting (ie endorsing) it. By definition, no issue of verification arises in such cases, because the defendant is not arguing that there were good reasons to believe the defamatory statement to be true: rather, the argument is that it was justifiable to publish it irrespective of its truth value.

Analytically, reportage is as different from the *Reynolds* defence as *Reynolds* was from qualified privilege. Yet, just as ordinary privilege provided the springboard for the *Reynolds* defence (now almost unanimously recognised as a distinct jurisprudential

⁶³ E. Descheemaeker, ‘Three Errors in the Defamation Act 2013’ (2015) 6 *Journal of European Tort Law* (forthcoming).

⁶⁴ *Flood v Times Newspapers Ltd* [2012] 2 AC 273.

creature), so reportage has been litigated under the heading – and is now codified as a form – of *Reynolds* privilege. This will need to be rectified as the conflation of doctrines grounded in separate logics is bound to cause disturbance. Because it failed to recognise this as its starting point in *Flood*, the Supreme Court found itself obliged to lay down principles applying across the whole spectrum of responsible publication, and therefore had to find a terminology that was unspecific enough to encompass both ‘mainstream’ *Reynolds* and reportage: mechanically, this steered it away from issues of verification – only relevant in ‘ordinary’ cases – and towards the new language of publication being ‘in the public interest’: a term so broad and vague that it could mean virtually anything.

Nevertheless, because there was clearly no intention on the part of the Court to change the substance of the defence outside the specific case of reportage, it can be accepted that *Flood* did not change the law in this respect. In turn, the preparatory works to the Defamation Act making very clear its intention to restate the existing law in its most recent (ie post-*Flood*) version,⁶⁵ it can – indeed it should – be accepted that, despite the striking change in terminology, the new Act has not in fact altered the substance of the law:⁶⁶ outside reportage, which is analytically separate, the defence of publication on matter of public interest is still one of reasonable belief in the truth of the published incrimination.

An Alternative Analysis

⁶⁵ J. Price and F. McMahon (eds), *Blackstone’s Guide to the Defamation Act* (Oxford: OUP, 2013) §§5.28, 5.37ff esp 5.46-5.47.

⁶⁶ While some early commentators were led astray (K.Y. Low, ‘*Reynolds* Privilege Transformed’ (2014) 130 LQR 24), it is reassuring to see the leading practitioners’ works now making this interpretation their own (Price and McMahon, n 65 above, §5.56; *Gatley*, n 8 above, §15.4).

The argument that has just been developed is that the English defence of (responsible) publication on matter of public interest not only conformed until 2013, but continues to reflect after the recent Defamation Act, the fault-shaped structure that was most clearly expressed in *Grant v Torstar*. There is however an alternative view, which either denies or simply ignores the element of blameworthiness (or lack thereof) in the defence and instead conflates the requirement of responsibility with that of public interest: on that view, there exists a public interest in receiving ‘fair, well-researched stories’;⁶⁷ and it is this overriding public interest – in the sense of interest on the public’s part – which justifies the absence of liability, independently of any considerations of fault/*culpa*.⁶⁸ Indeed the language used in the 2013 Act, with its move away from responsibility and towards the idea of public interest (which as was seen now features twice, at the ‘breadth’ and ‘depth’ stages), could be seen as an attempt – although not necessarily a conscious attempt – to reduce the entire defence to that one notion.

Instead of looking at it from the perspective of the defendant (his reasonable attempt to get it right, coupled with the fact that the subject-matter was objectively in the public interest), this analysis proceeds from the perspective of the *recipients* of the statement, ie the ‘world at large’ to whom it was published, holding that they have an interest – which by construction we can call a ‘public interest’ – in being communicated well-researched and verified allegations (even if they turn out to be false or not provably true), but not in reading shoddy journalism.⁶⁹ This alternative view does not contradict the previous one but, by moving the focus away from the defendant and onto third parties, it changes the perspective adopted in respect of the other defences, which

⁶⁷ E. Barendt, *Freedom of Speech* (Oxford: OUP, 2nd ed, 2005) 222.

⁶⁸ This is consonant with the orthodox understanding of qualified privilege towards which, perhaps paradoxically, this reading pushes the defence back.

⁶⁹ Barendt, n 67 above, 222; cf *Eerikäinen and Others v Finland* ECtHR 10 Feb 2009, [60].

hinders a coherent analysis of the law. It also fails to recognise, or at least to highlight, the move towards a *culpa* standard of liability which is not only observably true but, to my mind, of paramount importance to understand the modern law of defamation.⁷⁰ For these two reasons, it is an unhelpful alternative.

Innocent dissemination

On the face of it, the defence of innocent dissemination has very little, if anything, in common with responsible publication on a matter of public interest; yet as mentioned they share a common reliance on a broad negligence/*culpa* standard of liability, whereby the gist of the defendant's defence is to argue that, even though he caused the injury complained of, he is not to blame for doing so. Both at common law and under s 1 of the Defamation Act 1996, it is a defence for the defendant to show that he was not the author, editor or publisher (in the narrower sense of the term) of the statement at stake; that he took reasonable care in relation to its publication; and that he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.⁷¹ Within the scope of application of the defence, its reliance on a negligence standard could hardly be more explicit: it operates by literally *ex-culpating* the defendant, that is to say, by showing that he is not to blame for the injury he caused.

The 'culpabilisation' of defamation

The above analysis of responsible publication (outwith reportage) and innocent dissemination as going to the absence of fault, in the sense of negligence or *culpa*, should

⁷⁰ See below, 'The "culpabilisation" of defamation'.

⁷¹ *Gatley*, n 8 above, §§6.19-20.

not be overly controversial as far as the observation is concerned; yet their being characterised as such is bound to raise wide-ranging questions which strike at the heart of the law of defamation. Only a few remarks can be made in the present context.

The first one is that it represents a *shift of paradigm* – a term often abused but entirely suitable in this context. Whatever exactly the concept might have entailed (essentially a form of malevolence), it makes no doubt that historically slander was, from the earliest days, rooted in malice. Because malice was presumed from the publication of the *fama*-injuring words, much of the work of the tort became deciding under what circumstances the presumption would be rebutted. The twin defences of qualified privilege and fair comment emerged from this attempt to ossify the rebuttal of malice.⁷² Two facts, however, complicated the picture. One is that, in ordinary situations (ie those not covered by these two defences), the presumption became irrebuttable: this is why we often say that defamation is, in the modern law, a tort ‘of strict liability’.⁷³ Analytically it would be better to say that it is a tort based on deemed malice. The other is that, in those circumstances where it remained relevant, the meaning of the word changed, from what is often described as ‘malice-in-fact’ to ‘malice-in-law’: an intention – broadly construed – to cause the injury, regardless of motives.⁷⁴ All this is well-known and need not be rehearsed; all that matters for the present purpose is to highlight how the whole language of negligence, fault, reasonableness and the like was always alien to (or at the very least hidden in) the law of defamation. Malice and strict liability for acts which are definitionally almost always malicious are much closer from one another than appearances suggest, and both can be contrasted with the model best embodied in English law by the tort of negligence: that of reasonable care.

⁷² See above, ‘Malice and its rebuttal’.

⁷³ E. Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 OJLS 603, 625.

⁷⁴ *Bromage v Prosser* (1825) 4 B&C 247, 107 ER 1051; Mitchell, n 15 above, ch 5.

The second remark is that this alternative model could perfectly well be applied to the law of defamation. Sir Charles Wade, Premier of New South Wales, captured its gist most clearly and concisely when he declared, in the context of the proposed Defamation (Amendment) Act 1909 (NSW): ‘there is a general rule that a man, while exercising freedom of speech, must take care not to defame his neighbour’.⁷⁵ This is not the way English law has ever thought about it, but there is absolutely nothing unintelligible about applying to injuries to reputation the logic that underpins the tort of negligence. In that sense, English defamation is very different from its Roman counterpart or ancestor, the delict of *iniuria*. *Iniuria* was essentially insult, contempt; and no-one can insult without an intention to insult.⁷⁶ *Animus iniuriandi* was ontologically part of the Roman cause of action; but in English law malice is not: an (unlawful) injury to reputation can be malicious, blameworthy or neither. The standard of liability is a policy decision for the law to make, not a matter of logic. Though this point cannot be fully argued for here, it is not difficult to have sympathy for the view that malice-based liability in defamation is too restrictive (ie too protective of the defendant) and strict liability too broad (ie overly protective of the claimant), and thus that negligence is at least *prima facie* the right yardstick for the tort – or, to express the same idea differently, that the law has tended historically to meander between the extremes of taking reputation either too seriously or not seriously enough, when in reality it is neither more nor less valuable than such other interests as physical integrity or property rights, the protection of which has tended to be grounded in negligence.

The third remark is that, apart from any value judgement, it is observably true that this ‘culpabilisation’ of defamation is part of a much broader trend in the law of civil

⁷⁵ New South Wales Parliamentary Debates, 2nd Series, vol 35 (1909) 3103.

⁷⁶ E. Descheemaeker and H. Scott (eds), ‘*Iniuria* and the Common Law’, in Descheemaeker and Scott, n 47 above, 1, 11.

wrongs. In the Romanist tradition, the *culpa*-based action ‘for loss caused’ (*actio de damno dato*) has historically taken over most of the territory of the malice-based action ‘for insults’ (*actio iniuriarum*), subjecting property and personality rights alike to the same broad standard of unintentional fault. A similar movement can be observed in English law with the continuous expansion of negligence, which is now capable of redressing such intangible and non-pecuniary losses as deprivation of liberty⁷⁷ (even though it has, so far, been forcibly prevented from entering the ‘territory’ of defamation, except perhaps in an oblique way).⁷⁸

The fourth, and perhaps most important, remark is that a choice is called for. Nothing is more damaging for the intelligibility and accountability of the law than clashes of logics. Malice and negligence, *animus iniuriandi* and *culpa* are both tenable paradigms for the tort. But being rooted in different foundational assumptions about what defamation is and exists for, they should not co-exist. The law has largely moved away from the old paradigm of malice⁷⁹ but, as will be seen in the next section, many traces of it remain. Contrariwise it has largely allowed itself to be ‘infiltrated’ by ideas of negligence, which dominate the rest of the law of tort;⁸⁰ yet is far from having worked out the consequences of this alternative model. If it were to adopt it, all elements of the cause of action should, at least *prima facie*, be culpabilised. For instance, there should be no liability if the publication of the statement to third parties was not reasonably foreseeable; if there was no good reason to believe its content was defamatory or referring to the

⁷⁷ D. Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 MLR 59, 64-67 (and references cited).

⁷⁸ Descheemaeker, ‘Protecting Reputation’, n 73 above, 621-622.

⁷⁹ The allegation, even if purely formal, is no longer made in pleadings: *Gatley*, n 8 above, §§17.2, 28.10; *Motel Holdings Ltd v The Bulletin* (1963) 63 NSW 208 (‘“falsely and maliciously” may now be regarded as surplusage’).

⁸⁰ Descheemaeker, ‘Protecting Reputation’, n 73 above, 625ff.

claimant; if there were sufficient reasons to believe the incriminations to be true (even outwith the scope of public interest), etc.⁸¹ Currently, the law sits awkwardly between two models, even three if one adds the model of strict liability that was ushered in when the presumption of malice became irrebuttable.

DEFENCES WHICH OPERATE DESPITE THE INJURY BEING UNLAWFUL AND BLAMEWORTHY

The mapping exercise so far has revealed that, proceeding on the basis that the prima facie wrong of defamation consists in the publication of words having a tendency to lower the claimant's reputation in the eyes of others, a number of defences can be accounted for on the basis that either they deny that the injury was unlawful – in the specific sense that it was inflicted *inure*, ie in pursuance of a right or liberty – or they deny that the injury was blameworthy. This is easy both to understand and to accept on the basis of first principles widely recognised in the law of tort. The reverse side of the argument is that the other defences are not similarly easy to justify and therefore warrant greater scrutiny, both descriptively and normatively: when – and why is it – that the law protects the defendant despite his having committed an injury that was neither accidental nor inflicted in the pursuit of a right granted to him? This is what this final section explores.

Qualified privilege (outside of reports)

⁸¹ This says nothing as to whether the determination should be made as part of the prima facie cause of action or at the defences stage.

The first defence to consider is qualified privilege. In many ways, privilege is an extremely difficult doctrine – its treatment in *Gatley* runs to 169 pages – but the gist of the defence can in fact be easily summarised. *In some circumstances*, the law will presume that the context in which the defamatory statement was passed from the defendant to the third parties was such that – contrary to ordinary principles – there will be no reason to presume that the defendant was malicious:⁸² the claimant will therefore need to prove this element of malice positively if he is to succeed. Procedurally the sequence of events is that the defendant establishes the existence of the right circumstances; and then the claimant brings an affirmative answer (*replicatio*) of malice, which dislodges the prima facie defence. In this sense at least, privilege is simple.

The main difficulty is to identify the circumstances in which the publication will be privileged. *Gatley* mentions more than 60 different headings at common law or under statute; and the Defamation Act 2013 has recently expanded the scope of protection to yet more categories of publications, such as peer-reviewed statements in ‘scientific or academic journals’.⁸³ It might seem unreasonably daring to try and summarise these

⁸² Typically the privilege only applies to the disclosure as between defendant and that limited circle (outside of which the ordinary rules would reclaim precedence). The language of rights and duties is often resorted to in order to explain when the publication was ‘fairly warranted’ but in no systematic – or systematisable – way. There exist qualified privileges applying to the world at large (*Gatley*, n 8 above, §14.1) but this is not a departure from principles, these privileges applying to matter deemed to be of concern to the general public (eg proceedings of courts or Parliament): typically, albeit not invariably, these will qualify as reports rather than be incriminations originating with the defendant.

⁸³ Defamation Act 2013, s 6. However, whether this new provision actually strengthens the protection such publications are granted, compared to the pre-2013 situation where general defences had to be relied on (truth, qualified privilege, reasonable publication on matter of public interest, honest opinion), is unclear: as has been pointed out, the high-profile cases that spurred the reform of the law (especially *British Chiropractic Association v Singh* [2011] 1 WLR 133, which involved the *Guardian* newspaper being sued in

circumstance in one paragraph, but the following should provide some guidance. The first-level division – not currently identified by the law – is between those situations where the defendant *made* the incrimination (discounting, as the law does, expressions of distance) and those where he merely *repeated* them without making them his own, ie reports. Analytically the difference is clear and, for reasons to be explained below, it is highly significant when it comes to understanding what the law is aiming to do through the operation of privilege. Qualified privilege for reports is therefore cut out from the present section and will be dealt with alongside reportage in the next.

Outside reports, it cannot be very wrong – if only because it is so unspecific – to say that qualified privilege applies in situations where there was a *good reason* for the defendant to pass on the defamatory matter to others. In turn, this good reason can be seen as the reverse side of a *special relationship* existing between them with regard to that particular information (perhaps the most obvious, and historically central, example being that between a former and a prospective employer in respect of a reference).⁸⁴ This can be contrasted with non-privileged situations, where there is no such relationship and the publication of defamatory matter is therefore regarded as gratuitous. What is often lost sight of today is that none of this can be understood apart from the old paradigm of malice on which the law used to rely. In the former case, liability was to be for proven malice; in the latter malice was to be presumed (in time, irrebuttably so). Analytically, qualified privilege is an attempt to turn the (subjective) requirement of malice into an

respect of a column expressing scepticism as to the effectiveness of chiropractic) would have been unaffected by the statutory reform (Price and McMahon, n 65 above, §7.04).

⁸⁴ As mentioned, some forms of qualified privilege extend to publications to the world at large, but always in circumstances where it is easy to accept that the matter is one of legitimate interest for people generally. This does not contradict the idea of a special relationship underpinning the privilege; it simply applies it broadly.

objective set of criteria, while retaining the option to disregard this objectification when evidence shows it to be misguided in the instant case.

The question is thus bound to arise: if the law is no longer rooted in this standard of malice – as seems to be unanimously agreed – can we retain a doctrine which only makes sense against that background? Leaving aside for now situations where the defendant repeated an incrimination, should we be content with their having had an honest belief in the truth of the defamatory assertions they made before we relieve them of their potential liability? This seems unduly harsh on the claimant whose reputation is at stake. *Spring v Guardian*⁸⁵ provides a good case in point: by writing a reference which was not malicious but ‘simply’ negligent – the defendant repeated deeply injurious, albeit untrue, matters heard from various sources within the company, which it could not be bothered to check – an employer destroyed the career prospects (hence, in a real sense, the life) of its former employee in the small world of insurance companies. Should it be shielded from liability? It seems that, by wriggling its way around the rules of qualified privilege to grant a remedy in negligence for the economic loss caused by the defamatory statement, the House of Lords implied that it should not.⁸⁶ A similar attack on the doctrine could be mounted from a Convention rights perspective, for it is certainly arguable, at least when the defendant is a public authority, that its reliance on qualified privilege fails to provide sufficient protection to the claimant’s reputation.⁸⁷ If the above criticisms are true, what we need is for the law of defamation itself to impose a standard of *reasonable* belief in truth applying across the board, subject to possible exceptions to be identified. (Naturally, what amounts to ‘reasonable’ belief will be context-sensitive and

⁸⁵ *Spring v Guardian Assurance plc* [1995] 2 AC 296.

⁸⁶ Descheemaeker, ‘Protecting Reputation’, n 73 above, 634ff.

⁸⁷ *Clift v Slough Borough Council* [2009] 4 All ER 756 (QB); [2011] 3 All ER 118 (CA); cf Mullis and Scott, n 24 above, 47.

will depend, in particular, on the extent of the publication, ie the number and identity of recipients: this is simply an application of the ordinary principles of negligence or *culpa*).⁸⁸

Reportage and qualified privilege for reports

The doctrine of reportage was mentioned earlier in the context of the *Reynolds* privilege (now publication on matter of public interest) when it was argued that the former should not be regarded as a species of the latter, being an altogether distinct doctrine grounded in different considerations.⁸⁹ So was the existence of various types of privileges applying to reports, outwith any ‘special relationship’, both at common law and under statute (the latter having also been expanded as a result of the 2013 Act).⁹⁰ What is common to the two is that, as the very name suggests (to report = to convey anew), the defendant in that case did not make any incrimination; rather he passed on defamatory matter originating with someone else.

Qualifying the Rule of Repetition

The distinction has come to be blurred because a principle developed in the first part of the 19th century, according to which repeating an incrimination was tantamount in the eyes of the law to making it oneself: this became known as the ‘rule of repetition’, still in

⁸⁸ We might also need to revisit the fact that expressions of doubt and the like are *prima facie* disregarded by the law. If it is asserted that one has reason to suspect the claimant to have been guilty of wrongdoing, it is probably unreasonable to expect the defendant to prove good reasons to believe he actually *was* guilty.

⁸⁹ See above, ‘Responsible publication after the Defamation Act 2013’. The point is also made in J. Bosland, ‘Republication of Defamation under the Doctrine of Reportage’ (2011) 31 OJLS 89.

⁹⁰ Defamation Act 2013, s 7 (in particular with the inclusion of ‘fair and accurate report[s] of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest’ in s 7(5)).

force today.⁹¹ It superseded an earlier rule which considered that making it clear one's defamatory words originated with another, and naming that source, rebutted the presumption of malice, thereby preventing liability from arising.⁹²

One can easily sympathise with the view that repeating defamatory statements should not be too easily justified, in particular through the medium of *veritas*. Truth is – rightly – not concerned with whether the defendant ‘spoke the truth’ in the literal sense of the term, but whether the allegation he made was indeed founded: thus, for the statement ‘I heard that Peter is a thief’ to be justified, one must prove that Peter really is a thief, not that the defendant really heard he was. It is self-evident that repeating a defamatory statement can be injurious, indeed gravely so, even when no endorsement is made by the repeater (‘neutral reporting’). Yet, it is not difficult to see that, taken to its logical extremes, the rule is absurd. If it really was the case that repetition always counts as origination, given that any attempt to distance oneself from the incrimination is discounted by the law, a communiqué mentioning that ‘following an enquiry, Mr John Miller has been officially cleared of the allegation of fraud that was made against him’ would be defamatory of John Miller as repeating the allegation of fraud, and would – absurdly – require proof that he was in fact guilty of it to be justified. That the New South Wales Court of Appeal held that it was incapable of having a defamatory meaning shows that the rule of repetition is not absolute: indeed it could not be.⁹³

Even if we accept the rule of repetition as a starting point, it must be justifiable in some circumstances to pass on defamatory information without endorsing its truth, that is to say, irrespective of its truth value or any belief in this respect. (If the statement is endorsed, there is no difficulty with treating the defendant as the originator: whether or

⁹¹ *Gatley*, n 8 above, §11.18; *Mitchell*, n 15 above, 123-127.

⁹² *Mitchell*, n 15 above, 124-125.

⁹³ *Bik v Mirror Newspapers* [1979] 2 NSWLR 679 (NSWCA); *Gatley*, n 8 above, §6.51.

not he based himself on earlier sources has – rightly – never been a concern for the law.) In such cases, the publication will be protected not because its content is true, or honestly or reasonably believed so to be, but by the sole virtue of there being reasons to make it acceptable to share it. This defence we can call *warranted republication*. Its precise scope – ie what these ‘warrants’ are – cannot be examined further in the present context; all that matters for our purpose is to note that both the various forms of qualified privilege for reports and the fledgling doctrine of reportage are exemplifications of this defence, which in turn serves to qualify the rule of repetition. There might be other, not as yet identified, examples in the law.

Abolishing Qualified Privilege

To summarise: a defendant might, as a primary publisher, have had good reasons to believe the statement communicated to others to be true (‘reasonable truthfulness’) or he might, as a secondary publisher, have had good reasons to pass it on regardless of its truth value (‘warranted republication’). Apart from these, there does not appear to be any good reason why the publication of facts – as opposed to comments – which are not true should be protected. Accordingly, unless further grounds for protection can be identified, the historically out-dated defence of qualified privilege should be abolished and replaced with the above two defences, which respectively extend *Reynolds* to all defamatory matters and restrict the overly sweeping rule of repetition.

Offer of amends

Two final defences remain to be examined. The first is the mechanism known as offer of amends, even though only part of it is in fact a defence. Under the Defamation Act 1996, a defendant sued for defamation may opt to admit his wrong and offer to issue a

correction (and apology) and also to pay a sum to be agreed between the parties. The claimant may accept or reject that offer. An accepted offer of amends is, despite the terminology used, not a defence in any meaningful sense of the term: rather, the combination of agreement between the parties and payment of a money award makes it an alternative mechanism to resolve the dispute, very similar to any out-of-court settlement.

It is only if the offer is refused that the defence bites in, granting the apologetic defendant a shield against liability, unless it is shown that he ‘knew or had reason to believe’ that the statement was defamatory, false, and would be understood as referring to the claimant:⁹⁴ in other words he will be shielded unless shown to have been malicious. Although the wording could be seen as ambiguous, courts have made it clear that the protection extended, beyond the innocent defamer, to the negligent defendant:⁹⁵ this is an uncommon move *away* from the negligence standard, the earlier mechanism (under the Defamation Act 1952) having offered a defence only to those who had made a reasonable mistake.⁹⁶ In its pre-1996 version, the defence of (rejected) offer of amends would have gone into the above cluster of defences denying blameworthiness, ie asserting that the injury to the claimant’s reputation was accidental. In its current form, instead, the operation of the defence will be to treat the defendant exactly *as if* his statement had been protected by qualified privilege.

It is difficult to find any merit to this doctrine. Naturally, if the parties are happy to settle the dispute, out of their free and informed consent, without going to court, they are (and should be) at liberty to do so. There is no need for the law either to specify this or to impose the terms of the resolution. What is doubly puzzling, to say the least, with

⁹⁴ Defamation Act 1996, s 4(3).

⁹⁵ *Milne v Express Newspapers* [2005] 1 All ER 1021, [48]-[51] (CA).

⁹⁶ Defamation Act 1952, s 4.

the doctrine as laid down in statute is that (i) it constitute an evident attempt to encourage parties not to resort to the normal avenues of redress; (ii) it will take away, in most situations, the right of action from parties who refuse to settle extra-judicially with their opponent and insist on the remedies that the law is supposed to provide them with. Whether or not a claimant deserves a remedy in given circumstances is for the law to determine; but granting one in principle whilst encouraging the parties to sort out their dispute themselves, and punish the injured party if it refuses to do so, is indefensible; indeed it has been suggested that it might represent an unjustifiable encroachment on the protection of the Convention right to reputation.⁹⁷ Accordingly the safeguard offered to the defendant when his offer of amends is refused ought to be removed; as to the possibility for the parties to resolve their dispute without resorting to judicial process, it is so obvious that it need not be mentioned: it is the application of a general principle which is external to the law of defamation and should not form part of its substance.

Absolute privilege

There remains to finish some instances where the publication of a defamatory statement is protected absolutely, that is to say, it cannot give rise to an action in defamation under any circumstances, even if malice on the defendant's part can be proved. The list is long, with no obvious underlying unity but a clear focus on statements made as a direct part of

⁹⁷ Gavin Phillipson, 'Memorandum to the Joint Committee on Human Rights: the Defamation Bill 2012', [22]ff. at http://www.parliament.uk/documents/joint-committees/human-rights/Prof_Gavin_Phillipson.pdf (last accessed 5 March 2015).

the operation of the three branches of State power: executive, legislative and judicial.⁹⁸ The Defamation Act 2013 made a significant development here as well by extending the scope of such privilege to judicial organs of other States or of international organisations beyond those which involve the United Kingdom. On the face of it, this would seem to be a serious limitation on the protection of reputation, even more in need of scrutiny than non-absolute (ie ordinary) privilege, in respect of which a case for abolition was made. Indeed, the European Court of Human Rights has made it clear that it had jurisdiction to review the Convention-compliance of, in particular, national parliamentary privileges⁹⁹ (although it has not declared English law to be in contravention on this point).¹⁰⁰

In reality, however, Paul Mitchell has convincingly argued that absolute privilege does not operate as an immunity in the ordinary sense of the term; rather it functions as an ‘organising device’ according to which certain matters are better dealt with through specialised forms of redress:¹⁰¹ in the author’s words, ‘Parliamentary matters should be determined by Parliament, not the Courts; military matters should be heard by military tribunals; dishonesty in litigation should be dealt with under the specific wrongs dealing with litigation’.¹⁰² If this is true, it is very misleading to call absolute privilege a defence – rather, the substance of those rules should be removed from the defences stage and dealt with much earlier in the process, as part of the meta-rules which tell us which body of

⁹⁸ *Gatley*, n 8 above, §13.1. The protection extends to some reports of the primary incriminating statements. It is not clear why these should be subjected to a different standard from that applying to the various types of qualified privilege for reports.

⁹⁹ *A v United Kingdom* (2003) 36 EHHR 51, [66]ff, esp [74].

¹⁰⁰ *Ibid*, [89] (alleged violation by parliamentary absolute privilege of the right to ‘a fair and public hearing’ under Art 6 of the Convention).

¹⁰¹ Mitchell, n 15 above, ch 9.

¹⁰² Mitchell, n 15 above, 231.

rules and principles is applicable to the matter at hand. What absolute privilege signifies is simply that, just as the operation of tort might be excluded by the existence of a contract between the parties, so the law of defamation does not regulate these matters despite being *prima facie* relevant. No issue of defences can arise in the context of a tort which does not apply. There might be nothing wrong with the substance of absolute privilege, but it makes no sense to treat it as a liability-defeating further set of facts which prevents the *prima facie* wrong from coalescing into judgment for the claimant, when it really tells us that no wrong of defamation can be committed as between those parties because their relationship is not regulated by that set of rules.

CONCLUSION

This paper has attempted to examine all the doctrines known as defences which operate in the law of defamation so as to curb back the scope of liability after the *prima facie* cause of action – the publication of a defamatory statement – has been established by the claimant. The ambition was both descriptive and normative: seeing whether the long, and apparently haphazard, list of doctrines could be reduced to a few guiding principles; and if so whether these are satisfactory or, on the contrary, the law should be reformed (the two dimensions being, in this sort of taxonomical exercise, inextricably intertwined). At the end of the day, leaving aside the general defences of consent and release, limitation and *res judicata*, and having identified that absolute privilege is not so much a defence as the expression of an organisational meta-rule, we have uncovered, descriptively, the following principles.

The first-level division is between primary publishers, ie those making incriminations for themselves (even if they did not originate with them) and secondary publishers, ie those repeating incriminations without taking a stance as to their truth

value. Concerning the former, a first cluster of defences operates by showing that the injury caused to the claimant was not wrongful because it was inflicted *iure*, ie in pursuance of a right or liberty granted to the defendant because its object is regarded by the law as invariably more important than the protection of the plaintiff's reputation: truth/justification/*veritas* (concerned with the right to speak the truth about others) and fair comment/honest opinion (protecting the right to reason for oneself and share one's judgement with others). In the terminology sketched out at the beginning, these defences negative unlawfulness. A second cluster, responsible publication and innocent dissemination, operates by showing that the injury was not the defendant's fault (in the sense of negligence or *culpa*), in other words that it was an accident. In the above terminology, these negative blameworthiness. What makes these two groups of defences easy to understand and accept is that they exemplify principles which are already accepted in the law of tort, the only feature specific to defamation being the fact that, procedurally, so much of the labour of establishing the facts relevant to liability are placed on the defendant's shoulders.¹⁰³

Outside of these, there remains the old doctrine of qualified privilege and the more recent protection granted to apologetic defendants whose offer of amends was refused: it was argued that these should be abolished, being grounded in a paradigm, malice, which virtually no-one would suggest either underpins or should underpin the modern law of defamation, and stands in direct opposition to the 'culpabilisation' of

¹⁰³ There is reason to suspect that the division of labour between claimant and defendant is wrong as a matter of first principles but this question is outwith the scope of the present paper.

defamation, exemplified by our second cluster and which should, to my mind, be extended to all the requirements of liability in defamation.¹⁰⁴

Concerning secondary publishers, besides the above defences, they can also avail themselves of a defence which we called ‘warranted republication’, the effect of which is to qualify the excessively broad rule of repetition. Currently this doctrine is not thought of as a unity; rather it is exemplified by reportage and various forms of privileges for reports. It is hoped that the current debates surrounding the former will help the law identify and specify the scope of the doctrine, within which the existing defences should be subsumed.

The outcome of this exploration, provisional by the nature of the exercise, should be greatly encouraging to anyone who cares about the values mentioned at its outset: simplicity, rationality, consistency. The law adheres to these values to a significantly higher degree than the apparently random character of the original ‘heap of good learning’ might have caused the pessimistic enquirer to assume. Perhaps this is not such a surprise, however, for courts (and Parliament) typically give effect to rather basic intuitions of common morality, which we should not expect the law to depart widely from. The main difficulty is that, in an uncoded system, the process of law-making is by construction decentralised: thousands of individuals have had a direct say in shaping the English law of defamation over centuries. They are bound to have expressed these intuitions in slightly different ways. Much will have remained silent. And occasionally clashes between several plausible intuitions (eg malice-based and negligence-based liability) will have arisen, which need to be resolved. Lines will need to be drawn, on the basis of some higher authority, in the process of fine-tuning; but mostly the exercise for

¹⁰⁴ Again, this is far too broad an argument to be pressed in the present context. However, elementary logic suggests that this should be the case *if* negligence is indeed the proper standard of liability in defamation; and the evolutions documented above provide at least some evidence that the law believes it is.

legal scholars is one, not of creation, but of *identification* of what is already there – in an inchoate (or imperfectly choate), but nonetheless very real, form.